

**GOVERNOR'S OFFICE OF HIGHWAY SAFETY &  
ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**

**Present**

**2017 Crash Reconstruction Conference**

September 18-19, 2017

Phoenix, Arizona



**Basics of a Vehicular Homicide**

Presented by:

**Aaron Harder**

Vehicular Crimes Bureau Chief

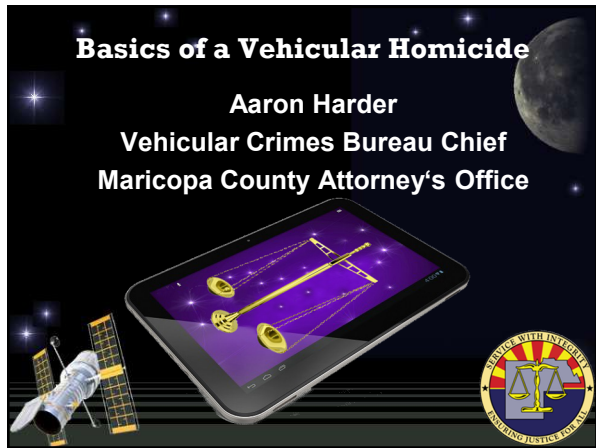
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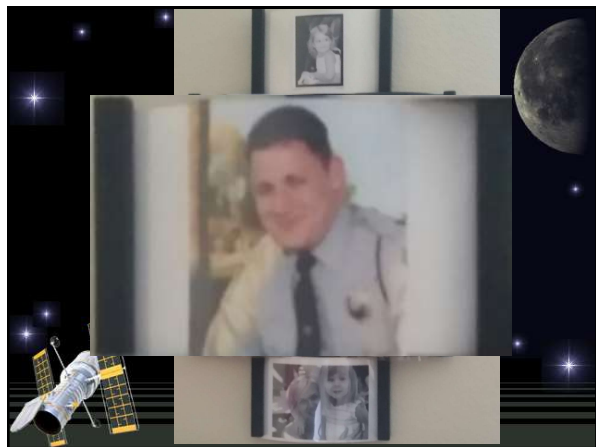
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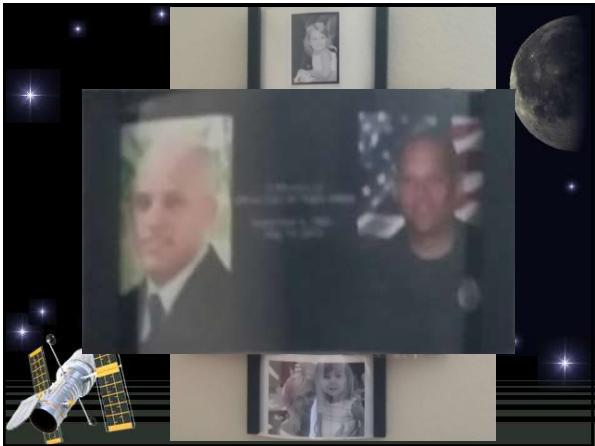
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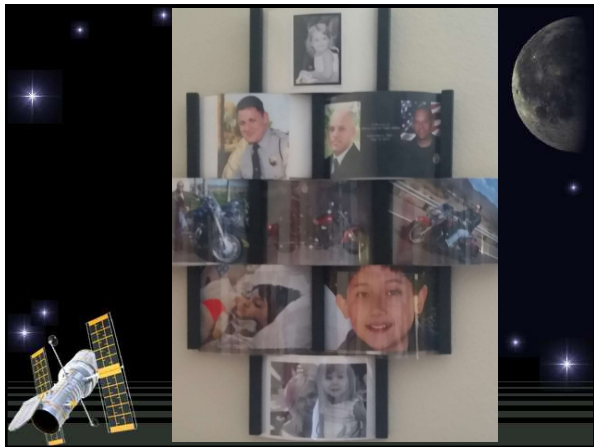
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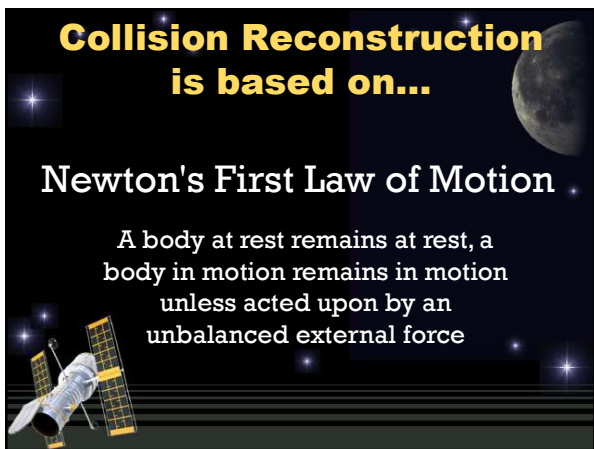
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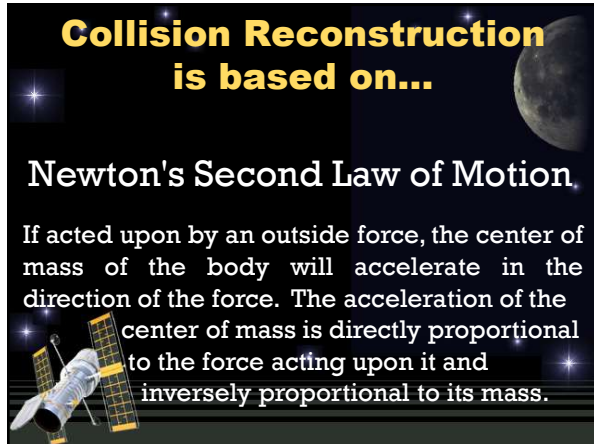
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**Collision Reconstruction  
is based on...**

**Newton's Second Law of Motion**

If acted upon by an outside force, the center of mass of the body will accelerate in the direction of the force. The acceleration of the center of mass is directly proportional to the force acting upon it and inversely proportional to its mass.

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**Collision Reconstruction  
is based on...**

**Newton's Third Law of Motion**

For every action there is an equal and opposite reaction. The opposing forces are equal in magnitude and opposite in direction.

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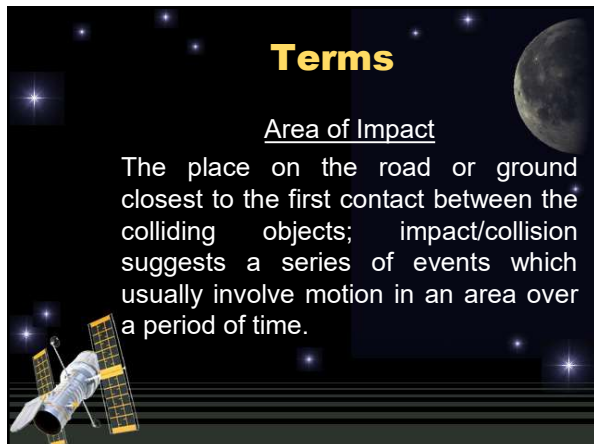
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**Terms**

Area of Impact

The place on the road or ground closest to the first contact between the colliding objects; impact/collision suggests a series of events which usually involve motion in an area over a period of time.

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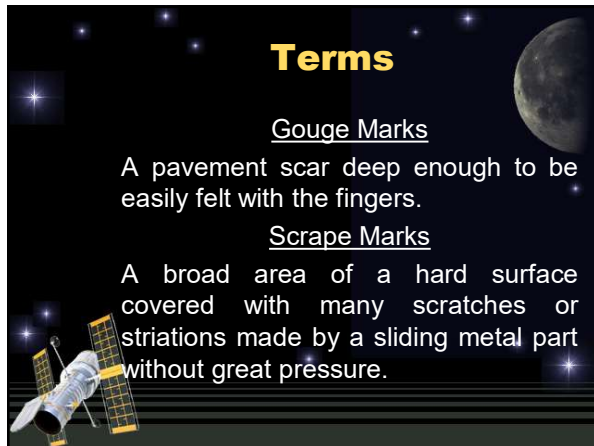
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## Terms

Gouge Marks  
A pavement scar deep enough to be easily felt with the fingers.

Scrape Marks  
A broad area of a hard surface covered with many scratches or striations made by a sliding metal part without great pressure.

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## Gouge Marks




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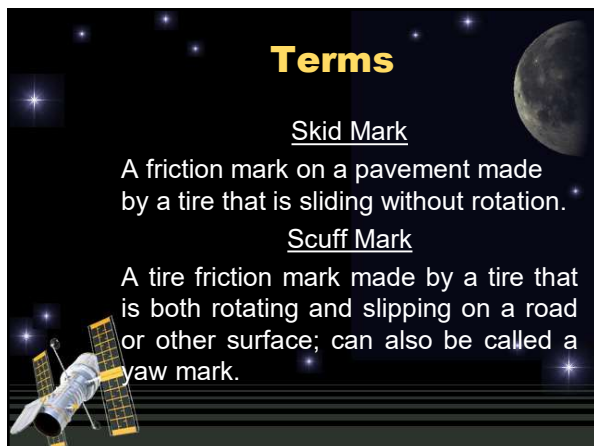
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## Terms

Skid Mark  
A friction mark on a pavement made by a tire that is sliding without rotation.

Scuff Mark  
A tire friction mark made by a tire that is both rotating and slipping on a road or other surface; can also be called a yaw mark.

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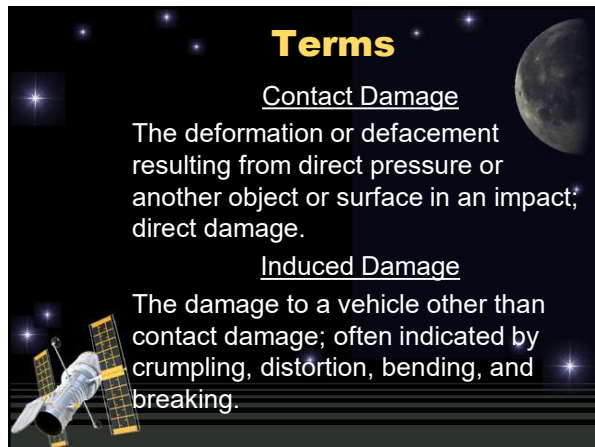
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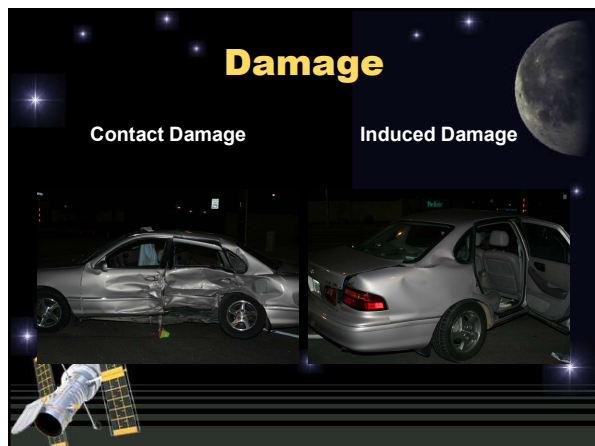
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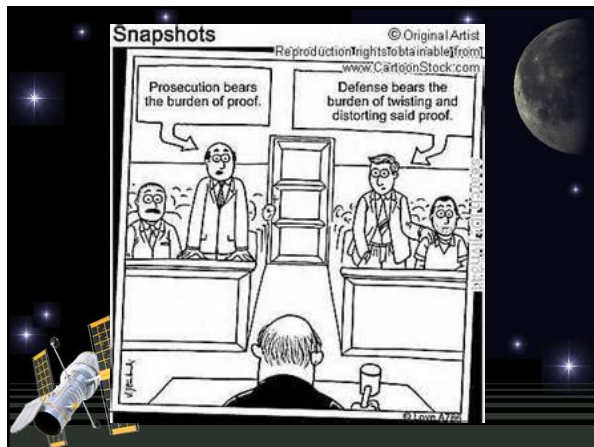
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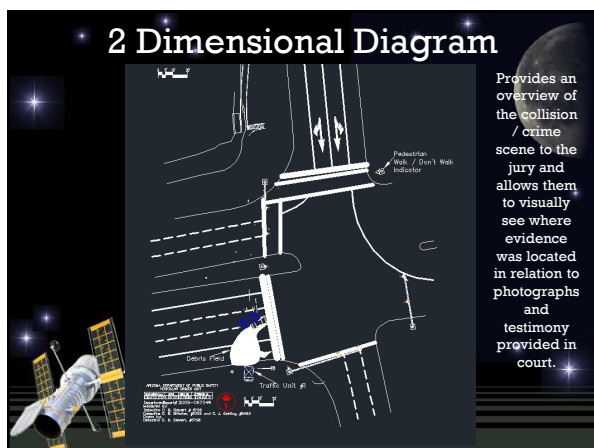
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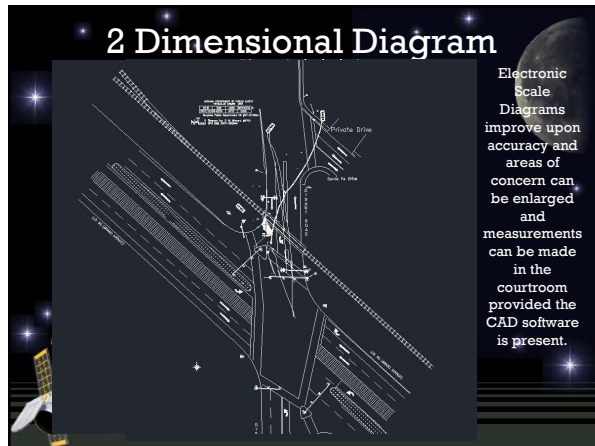
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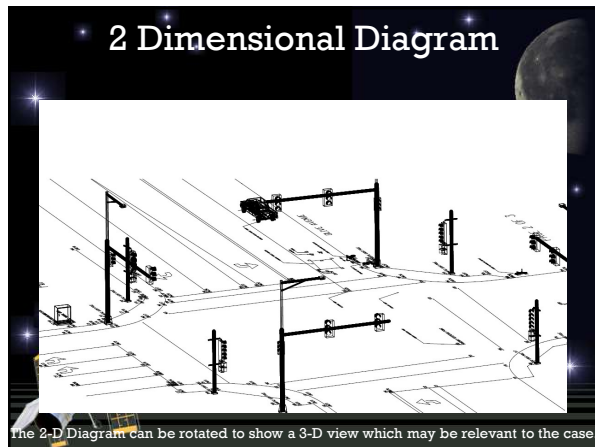
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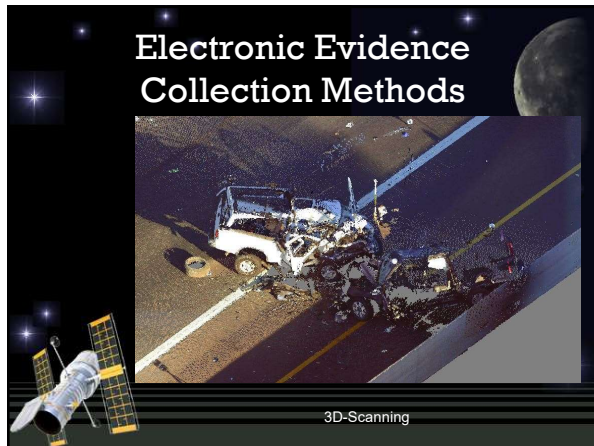
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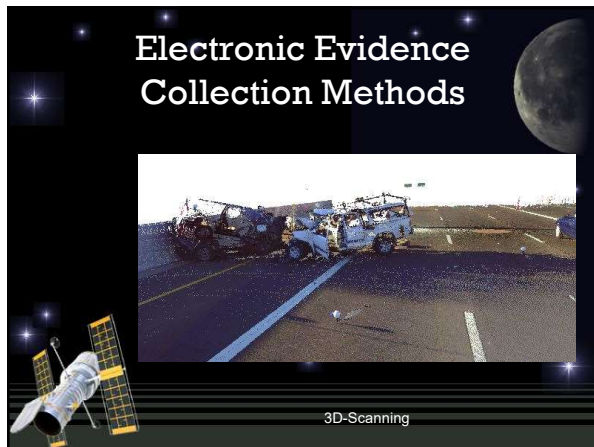
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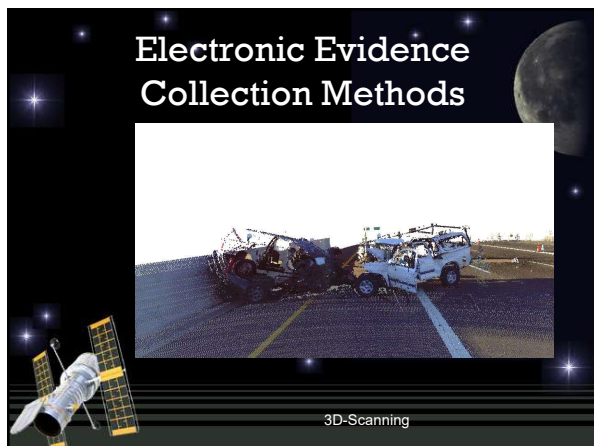
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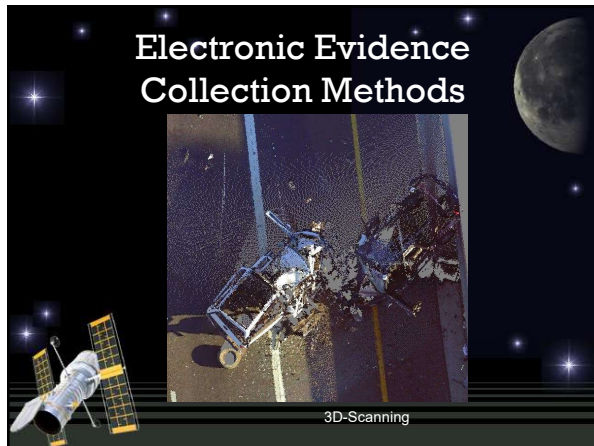
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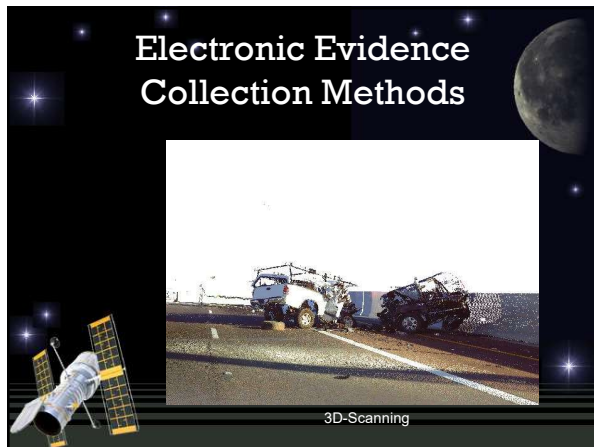
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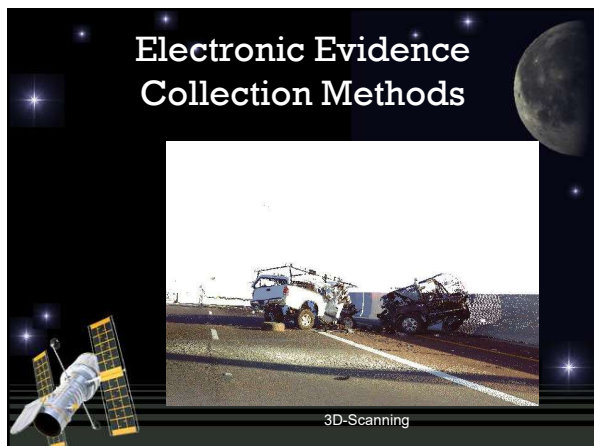
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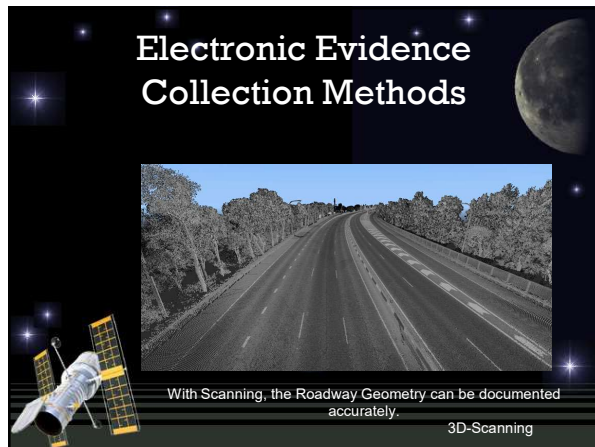
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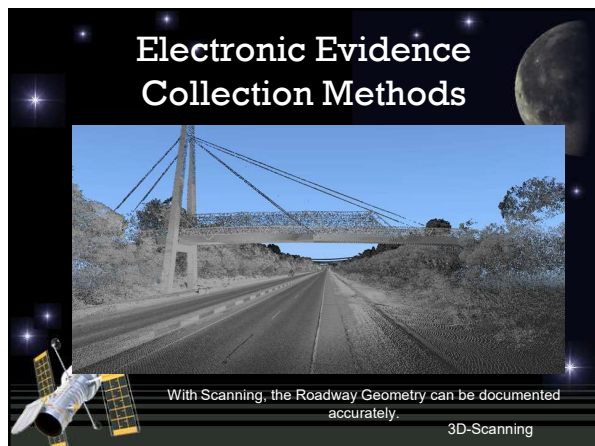
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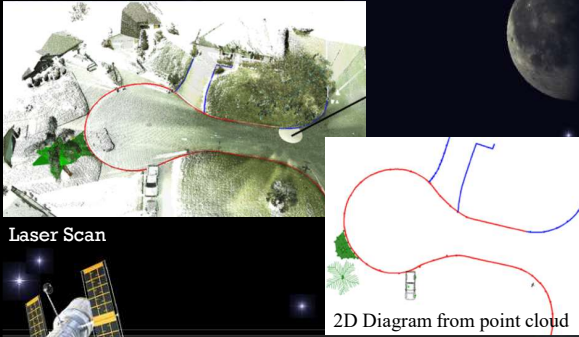
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### Electronic Evidence Collection Methods



Laser Scan

2D Diagram from point cloud

3D-Scanned Scene and its use creating a 2D diagram for reporting purposes.

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### Airbag Control Modules



If the vehicle is equipped with an Airbag Control Module Data may be obtained to assist with the Reconstruction.

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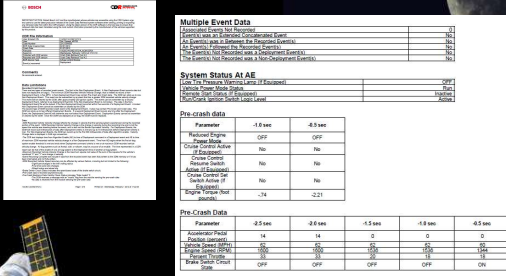
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### Airbag Control Modules



Crash Data Retrieval Reports provide a secondary check to the Reconstructionist about methods used and accurate speed determination. Airbag Control Modules provide up to five seconds of pre-collision data

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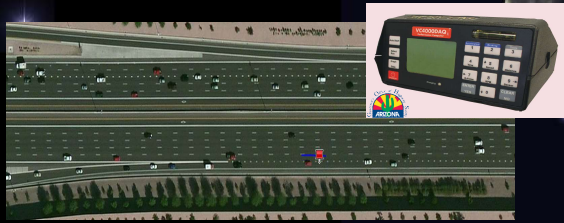
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## Vericom 4000DAQ



GPS Link adds another check to aid in the roadway friction calculations.

Header	Data	VC4000 Settings	Quick Graph	Map							
Time	Accelerat	Speed	Dist	GPS Spec	GPS Dist	GPS D-La	GPS D-La	GPS List	GPS Long	Gym-Pilot	Gym-Pilot
Secs	G	MPH	ft	MPH	ft	ft	ft	deg	deg	deg/sec	deg
✓	0.000	0.000	32.77	0.00	33.85	0.00	0	0	33.8582	111.89880	0.0
✓	0.010	-0.288	32.71	0.48	33.85	0.00	0	0	33.8582	111.89880	-2.8
✓	0.020	-0.264	32.63	0.96	33.77	0.99	0	0	33.8582	111.89880	-3.8

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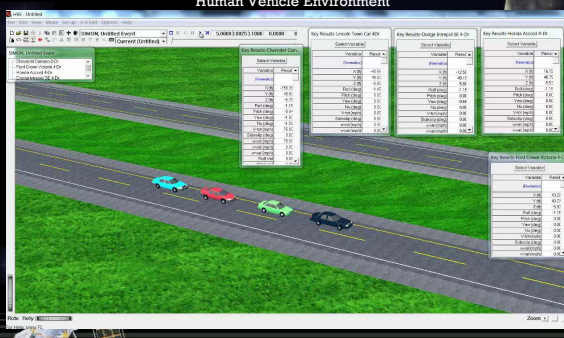
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## Collision Simulation HVE

Human Vehicle Environment



Collision Simulation Software Saved as a Video File

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## Formulas

- Critical Speed
- Momentum
- Time Distance
- Airborne Equations
- Crush

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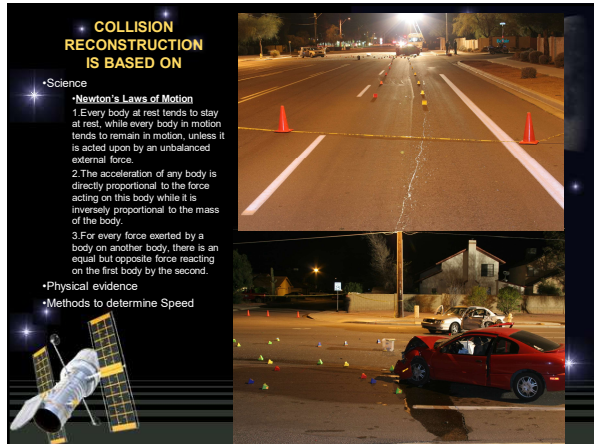
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**COLLISION RECONSTRUCTION IS BASED ON**

- Science
  - Newton's Laws of Motion
    1. Every body at rest tends to stay at rest, while every body in motion tends to remain in motion, unless it is acted upon by an unbalanced external force.
    2. The acceleration of any body is directly proportional to the force acting on this body while it is inversely proportional to the mass of the body.
    3. For every force exerted by a body on another body, there is an equal but opposite force reacting on the first body by the second.
- Physical evidence
- Methods to determine Speed




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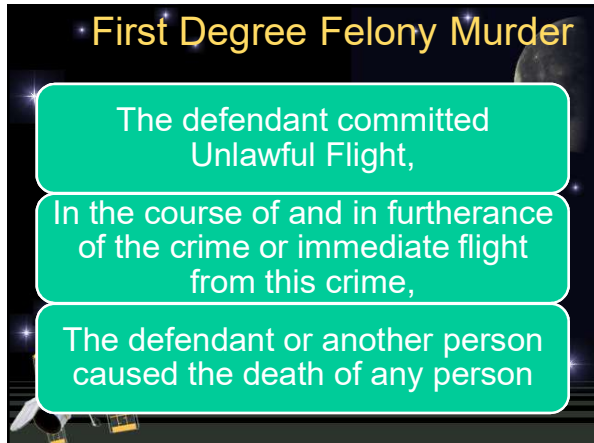
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**First Degree Felony Murder**

The defendant committed Unlawful Flight,

In the course of and in furtherance of the crime or immediate flight from this crime,

The defendant or another person caused the death of any person




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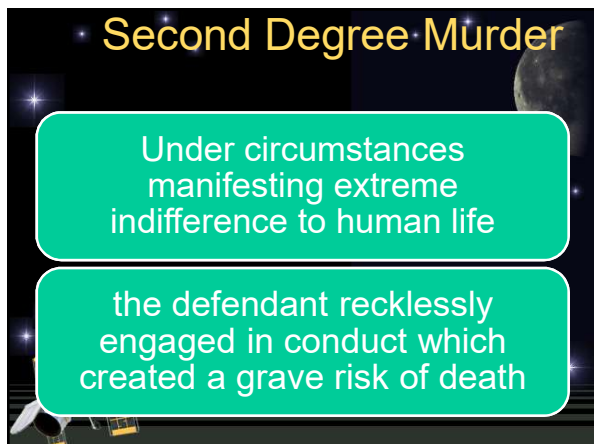
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**Second Degree Murder**

Under circumstances manifesting extreme indifference to human life

the defendant recklessly engaged in conduct which created a grave risk of death




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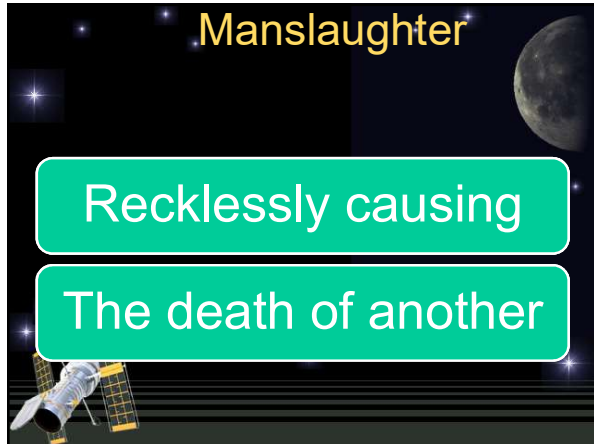
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**Manslaughter**

Recklessly causing

The death of another

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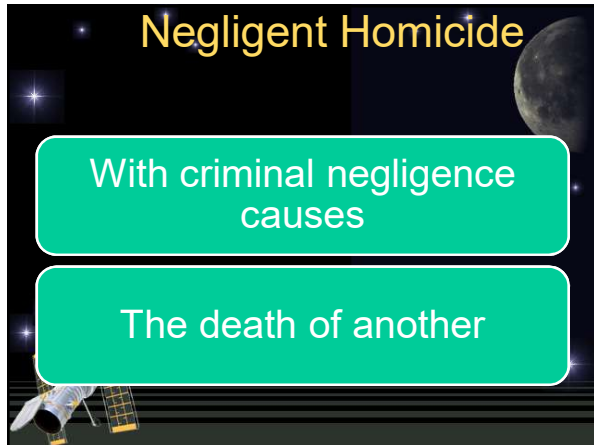
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**Negligent Homicide**

With criminal negligence  
causes

The death of another

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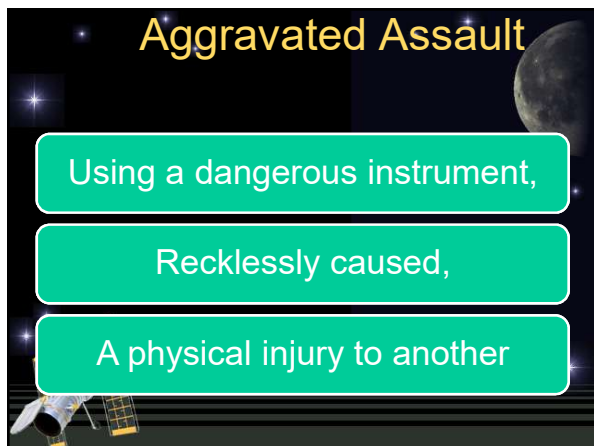
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**Aggravated Assault**

Using a dangerous instrument,

Recklessly caused,

A physical injury to another

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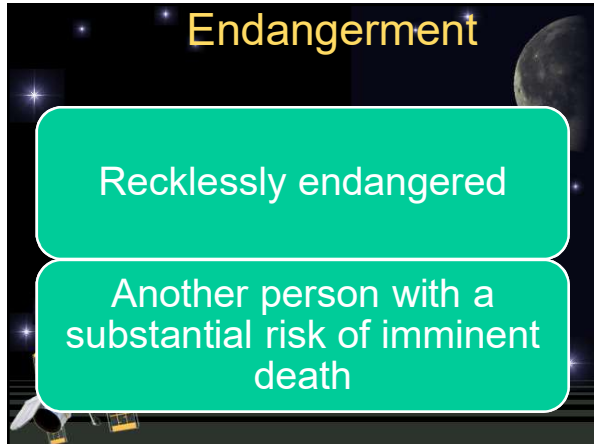
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## Endangerment

Recklessly endangered

Another person with a  
substantial risk of imminent  
death

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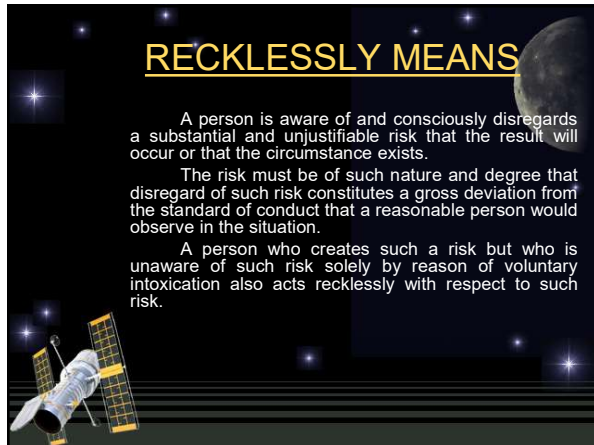
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## RECKLESSLY MEANS

A person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.

The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

A person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

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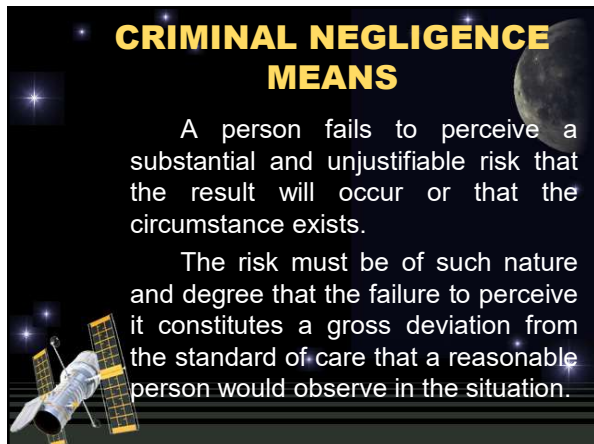
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## **CRIMINAL NEGLIGENCE MEANS**

A person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists.

The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

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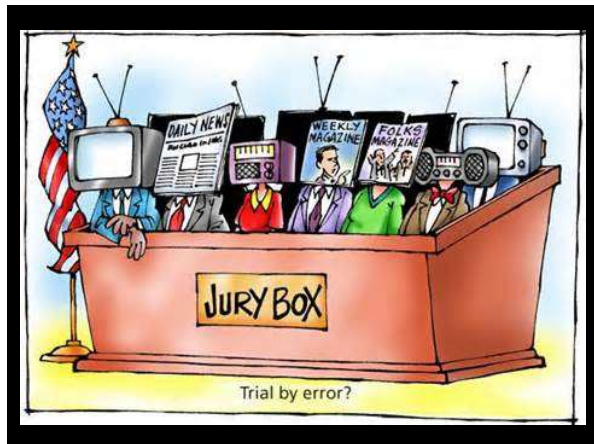
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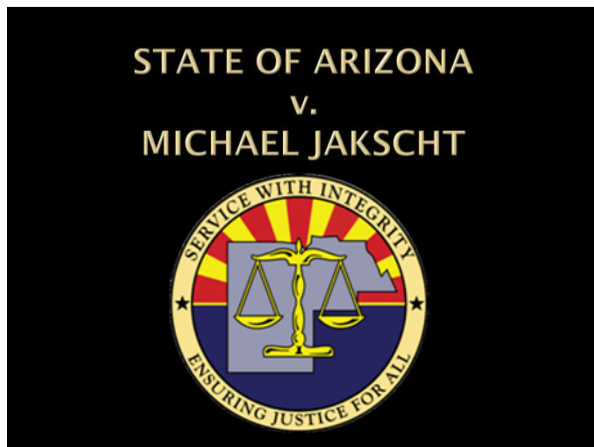
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**BEYOND A REASONABLE DOUBT**

- ▣ It is not beyond all doubt
- ▣ It is not beyond every doubt
- ▣ It is not beyond imaginary doubt
- ▣ It is not beyond a shadow of a doubt

If you are firmly convinced that the defendant is guilty then you must find  
Him guilty!

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## This is NOT a Tragic Horrible Accident




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## RECKLESSLY MEANS

A person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.

The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

It is no defense that a person who created such a risk was unaware of it solely because of voluntary intoxication

A person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

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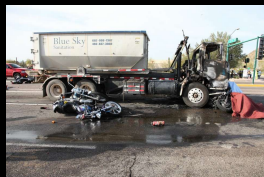
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## The Defendant Acted Recklessly

### Controlled Substance Use

#### §382.213

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner who has advised the driver's ability to safely operate a commercial motor vehicle.




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## METHAMPHETAMINE

- ▣ Therapeutic – Taken under doctors supervision, controlled doses; safe amounts of the drug.
- ▣ Recreational – Purpose other than medical purposes.
- ▣ Therapeutic Range – 50 to 200 ng/ml
- ▣ Defendant had 460 ng/ml of Methamphetamine in his blood.
- ▣ Dr. Abrams and Dr. Platt would not ride with the defendant.

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## Methamphetamine Made In Clandestine Labs

- No controls
- Use pseudoephedrine
- Use carburetor fluid
- Use fertilizer
- Use lithium from batteries
- Mixed with other things.

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## The Defendant Failed to Act




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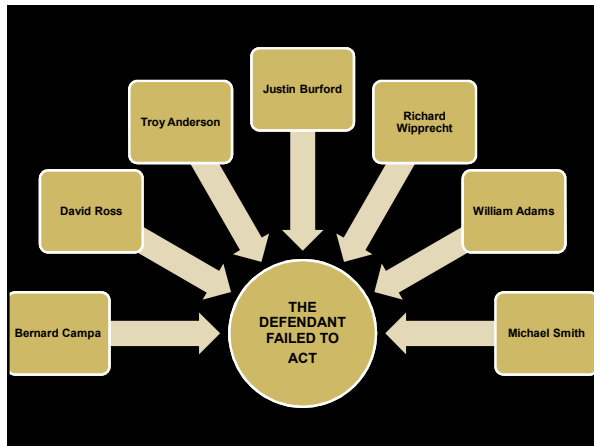
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## No One Saw Break Lights



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## Others Reacted

Barry Sprink



Daniel Dillon



Robert Lee

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## THE IMPAIRMENT




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### IMPAIRMENT

Detective Campbell  
and  
Officer Toland

Highly trained in  
detecting drug  
impairment

- ▣ Slow and Deliberate Walk
- ▣ Fidgety
- ▣ Sway
- ▣ High pulse 116 bpm
- ▣ Walk and Turn
  - Poor balance
  - Stepped off the line twice
- ▣ Body Tremors
- ▣ Dilated pupils in room light
- ▣ Dropped water bottle
- ▣ Poor judgment
- ▣ Defendant's statements
  - Ice Cream
  - How the crash occurred
- ▣ Could not do more tests because refused

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## John Musselman

- ▣ Forensic Toxicologist for the City of Phoenix
- ▣ Impairment is a measurable loss of ability to perform a task; manifests itself when a driver makes a mistake and either is pulled over or crashes.
- ▣ Abusive levels – Likely to see:
  - Perception affected
  - Increase risk taking
  - Reaction – take longer to react
  - Meth is a mind altering drug
  - Impact estimates of speed, distance and time

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## 2007 Presentation On Meth Impaired Driver In Arizona

- Looked at level of meth where DRE called impairment
- Looked at driving behavior
- 9% - Over 1000 ng/ml of Meth
- 50% - 200 to 1000 ng/ml of Meth
- 40% - Less than 200 ng/ml of meth
- Violent crashes, went left of center
- Arms out during the Walk and Turn

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## DR. BARRY LOGAN

Ph.D. Forensic Toxicology  
Over 25 years experience in toxicology  
Expert drugs and their affects on humans and driving

**Impairment** – the ability to perform a particular task; interferes with the ability of the skills to perform a particular task; are able to perform a task but cannot perform as efficiently.

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## Dr. Logan's Opinion

At the time of the collision the defendant was under the influence of Methamphetamine!

- ▣ Fidgety behavior
- ▣ Finger movements
- ▣ Errors on the Walk and Turn
  - Balance with arms
  - Motor functions
- ▣ High pulse, 116 bpm
- ▣ Dilated pupils
- ▣ Stress of event
- ▣ Methamphetamine in blood – affects brain chemistry; negative impact on driving
- ▣ Driver inattention
- ▣ Methamphetamine concentration
- ▣ Crash itself

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## The CRASH



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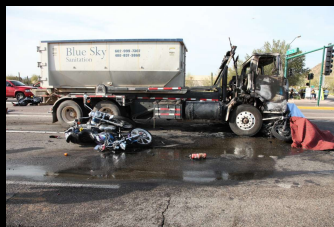
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March 25, 2010

12:59 p.m.

27<sup>th</sup> Drive and  
Carefree  
Highway



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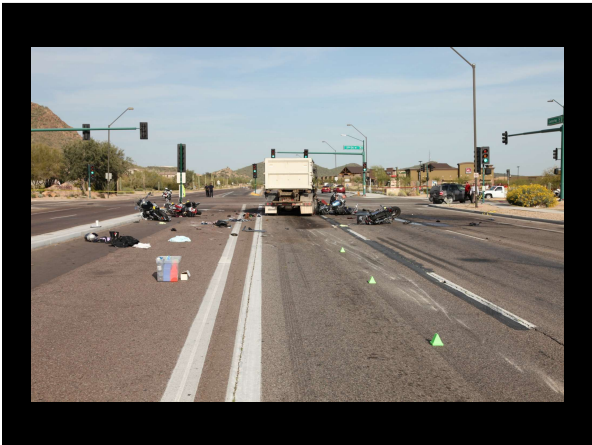
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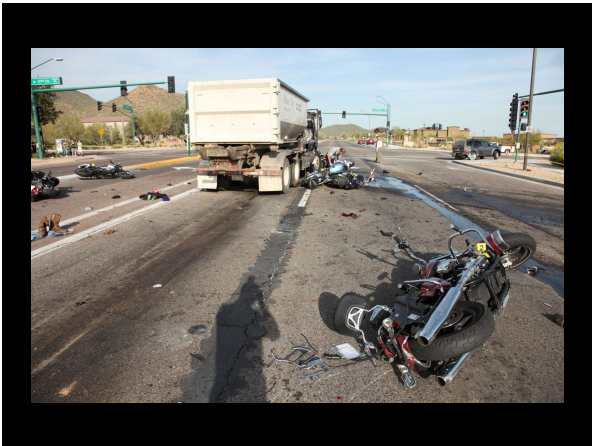
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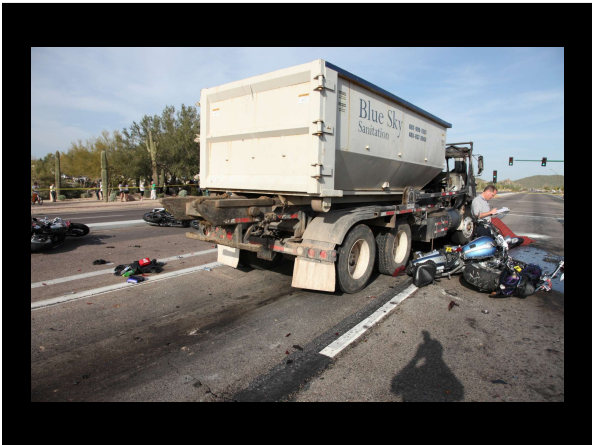
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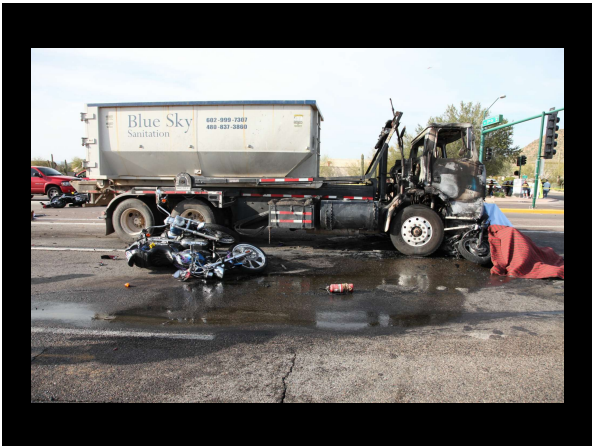
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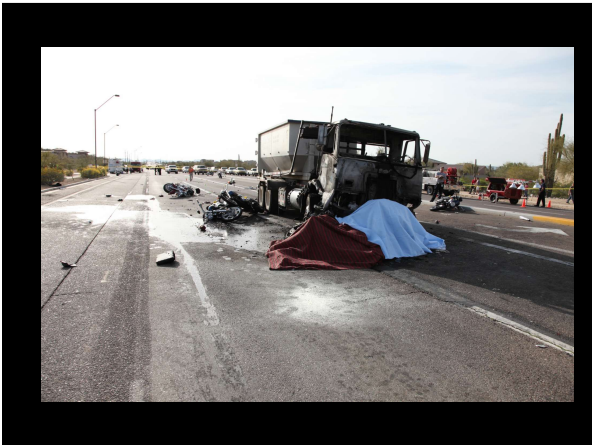
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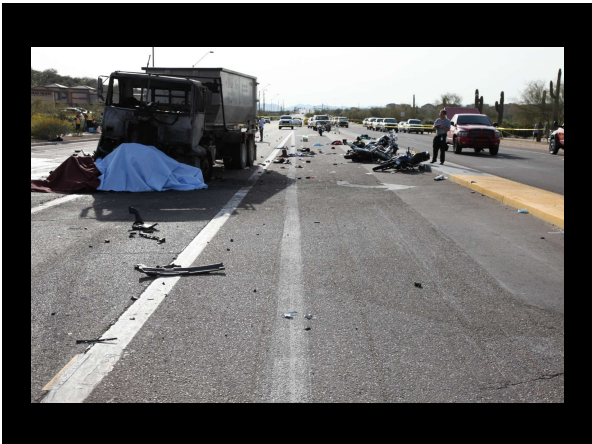
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## The Defendant's Stories

1. To Justin Burford  
Asked Justin what happened
2. To Tania Krukoff  
Defendant did not see them; was reaching for paperwork; nothing said about brakes
3. To Todd Mielke  
Said nothing about brakes
4. To Brett Campbell  
Looking for a sandwich shop; saw motorcycles stopped at a red light; looked south for a sandwich shop; looked back and on top of the motorcycles; tried to stop but could not.

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## Stopped for the Red Light

1. Stephen Punch
2. Daniel Butler
3. Dayle Totonchi
4. Clyde Nachand
5. Ernie Lizarraga
6. Jason Anania
7. Terrance Lauritsen
8. Julie Fantechi
9. Todd Faasse
10. William Adams




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## THE BRAKES

- Phil Smith  
Expert Mechanic  
Officer Pacheco
- ▣ Three of Six Brakes out of adjustment
  - ▣ Will Stop, not as efficiently
  - ▣ Should have seen in Pre-trip inspection
  - ▣ Not a catastrophic brake failure
- Alan Coulter – testified no mechanical or brake failure.




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## DANGEROUS

### DANGEROUS OFFENSE

An offense is a dangerous offense if it involved the use of a dangerous instrument.

### DANGEROUS INSTRUMENT

"Dangerous Instrument" means anything that under the circumstances in which it is used is readily capable of causing death or serious physical injury

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"Dangerous Instrument" means anything that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

#### Examples:

- ▣ Pen/Pencil – used for writing not a dangerous instrument; used for stabbing an eye out it is a dangerous instrument
- ▣ Bottle – used as a container not a dangerous instrument; break it and use it to stab or slash a person it is a dangerous instrument
- ▣ Vehicle – used in a proper and safe manner not a dangerous instrument; use it in an unsafe manner it is a dangerous instrument

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## THE DEFENSE

- ▣ Dr. Abrams
- ▣ Dr. Lance Platt
- ▣ Alan Coulter
- ▣ Randy Anglin

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# FIND THE DEFENDANT GUILTY



*With a sickening jolt, Mel realized the awful truth: he was being defended by a pair of court-appointed light-weights, against the sharpest prosecutors in the county.*

# Thank You



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# Helping the Jury to Understand Reckless Behavior

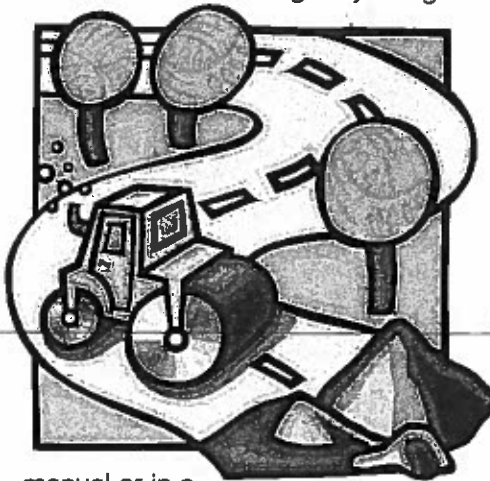
by John Kwasnoski

Prosecutors and police have all seen the fatal DWI crash in which the defendant's vehicle barreled out of control at a speed greatly in excess of the posted limit, went out of control, struck a tree or utility pole, and may have even torn the vehicle in two. There is little doubt about the speed, but as the case is prepared for trial the prosecution is troubled by the jury's potential inability to find the defendant's behavior to be reckless. So let's take a look at what reckless operation of a motor vehicle really is from the perspective of the person who designs the roads to be safe.

**A General Definition of Reckless**  
Webster's definition of reckless includes such language as "not regarding consequences" and "irresponsible," but making it clear to the jury might include relating the defendant's behavior to the driver behavior for which the roadway itself was designed to be safe. Why was the speed limit of the road posted as it was - what safety and human factor considerations led to the decision to post the legal speed limit at 35 mph? This could involve the town engineer or highway engineer, or an outside roadway design expert to explain to the jury the design considerations involved with the determination of a safe speed limit for any road. If the road is posted with a speed limit of 35 mph it should be understandable that operating at a speed of 65 mph on that road might create situations that are not safe, and that might endanger other people using the road.

## Engineering Roads

For example, in the design of a new condominium complex the planners had to look at how much sight distance would be afforded to people in the complex who wanted to exit the driveway and enter the roadway safely. A sight assessment was conducted, and then a determination was made of the safe operating speed consistent with that sight distance. Perhaps changes were made to the road environment to provide the needed sight distance. If there was insufficient sight distance it may have been necessary to post signs on the road warning of a "hidden driveway." The driveway design is evaluated with regard to established highway design guidelines published in either a state highway design



manual or in a nationally-recognized manual like the "green book" (1). The professional highway design engineer can explain to a jury the consequences of people exiting a driveway onto a roadway when available sight distance does not allow them to see approaching

**If it looks, walks, and sounds like recklessness be sure the jury can connect the defendant's reckless actions with the legal definition they will hear in the charging instructions.**

traffic, because the traffic is traveling at too great a speed. The engineer can explain the reality of "an accident waiting to happen" when drivers operate at speeds well in excess of the posted limit at particular locations along the roadway on which the defendant operator traveled.

In one case in which the author worked, a site map of the roadway showed over thirty potentially dangerous situations created by the defendant operator's excessive speed, including inability to see around turns in the roadway, over the crests of rolling hills, approaching pedestrian crosswalks, and approaching traffic control signs and intersections. Clearly, the design guidelines showed that at the speed the defendant was operating the situations were not safe for other drivers operating prudently. In fact,

(Continued on page 6)

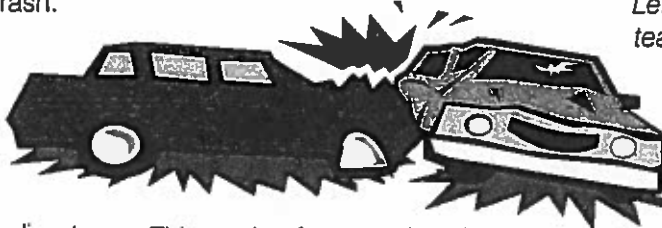
## Reckless Behavior *(Continued from page 5)*

based on the defendant's speed being so far in excess of the safe design speed for the road, the jury could clearly see that it was almost a certainty that the defendant driver would eventually cause a crash.

### Be Visual

A site map could be used to show potentially dangerous situations where the defendant's speed created a potential for disaster. The local engineer could tell the jury why each situation was so dangerous based on the guidelines used to design the road and determine what the speed limit should be. The jury should be able to see why they themselves would be in danger if they had been on that road at the time the defendant's crash occurred. If it

looks, walks, and sounds like recklessness be sure the jury can connect the defendant's reckless actions with the legal definition they will hear in the charging instructions.



This tactic of connecting the meaning of reckless to the safety considerations governing safe road design might resonate with jurors and give them a basis for reaching a decision.

**Editor's Note:** John B. Kwasnoski is Professor Emeritus of Forensic

Physics at Western New England College, Springfield, MA after 31 years on the faculty. He is a certified police trainer in more than 20 states. He is the crash reconstructionist on the "Lethal Weapon - DWI Homicide" team formed by the National Traffic Law Center to teach prosecutors how to utilize expert witness testimony and cross examine adverse expert witnesses and he is the author of the book, "Investigation and Prosecution of DWI and Vehicular Homicide" Prof. Kwasnoski has reconstructed over 650 crashes.

(1) "A Policy on Geometric Design of Highways and Streets," 1990, AASHTO (American Association of State Highway Transportation Officials).

## Calendar of Events

February 17

March 24

April 4

April 20

May 3-4

June 8

July 7

August 10-11

September 6-16

Basic Cops in Court

Working with the Media

Basic PowerPoint

Advanced Cops in Court

Basic OWI Prosecution

Advanced Cops in Court

Advanced PowerPoint

Advanced OWI Prosecution

Regional Round Table Meetings

Kalamazoo

Bath

Lansing

Ann Arbor

Grand Rapids

Bay City

Lansing

Lansing

Kalamazoo

Ann Arbor

Port Huron

Gaylord

Escanaba

Lansing

September 27-29

Protecting Lives, Saving Futures

Westlaw.

95 P.3d 116

Page 1

32 Kan.App.2d 1087, 95 P.3d 116  
(Cite as: 32 Kan.App.2d 1087, 95 P.3d 116)

**H**

State v. DoubKan.App.,2004.  
Court of Appeals of Kansas.  
STATE of Kansas, Appellee,  
v.  
John P. DOUB, III, Appellant.  
No. 90,536.

Aug. 6, 2004.  
Review Denied Dec. 14, 2004.

**Background:** Defendant was convicted in the Sedgwick District Court, Rebecca L. Pilshaw, J., of second-degree murder, and he appealed.

**Holdings:** The Court of Appeals, Greene, J., held that, as matter of first impression:

(1) the required state of mind for depraved heart murder can be attributed to the driver of an automobile in a fatal collision, and relevant factors to show such state of mind include intoxication, speeding, and near or nonfatal collisions shortly before the fatal accident; and

(2) evidence was sufficient to support defendant's conviction for depraved heart murder.

Affirmed.  
West Headnotes

[1] Criminal Law 110 ⇨ 1144.13(3)

110 Criminal Law  
110XXIV Review  
110XXIV(M) Presumptions  
110k1144 Facts or Proceedings Not  
Shown by Record  
110k1144.13 Sufficiency of Evidence  
110k1144.13(2) Construction of  
Evidence  
110k1144.13(3) k. Construction

in Favor of Government, State, or Prosecution.  
Most Cited Cases

Criminal Law 110 ⇨ 1159.2(7)

110 Criminal Law  
110XXIV Review  
110XXIV(P) Verdicts  
110k1159 Conclusiveness of Verdict  
110k1159.2 Weight of Evidence in  
General

110k1159.2(7) k. Reasonable  
Doubt. Most Cited Cases

When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

[2] Homicide 203 ⇨ 533

203 Homicide  
203II Murder  
203k533 k. Recklessness, Wantonness, or  
Extreme Indifference. Most Cited Cases  
Depraved heart murder is distinguished from reckless involuntary manslaughter by the additional element that the reckless killing occur under circumstances manifesting extreme indifference to the value of human life. K.S.A. 21-3402(b).

[3] Homicide 203 ⇨ 533

203 Homicide  
203II Murder  
203k533 k. Recklessness, Wantonness, or  
Extreme Indifference. Most Cited Cases  
Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second-degree murder, and less extreme recklessness is punished as manslaughter. K.S.A. 21-3402(b).

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95 P.3d 116

Page 2

32 Kan.App.2d 1087, 95 P.3d 116  
(Cite as: 32 Kan.App.2d 1087, 95 P.3d 116)

## [4] Homicide 203 ⇐546

## 203 Homicide

## 203II Murder

## 203k544 Second Degree Murder

## 203k546 k. Intent or Mens Rea; Malice.

## Most Cited Cases

Amendment to the second-degree murder statute eliminated malice as an element of second-degree murder in Kansas. K.S.A. 21-3402.

## [5] Automobiles 48A ⇐343

## 48A Automobiles

## 48AVII Offenses

## 48AVII(A) In General

## 48Ak342 Homicide

## 48Ak343 k. Murder. Most Cited Cases

The required state of mind for depraved heart murder can be attributed to the driver of an automobile in a fatal collision, and relevant factors to show such state of mind include intoxication, speeding, near or nonfatal collisions shortly before the fatal accident, driving on the wrong side of the road, failure to aid the victim, failure to heed traffic signs, failure to heed warnings about reckless driving, and a prior record of driving offenses. K.S.A. 21-3402(b).

## [6] Homicide 203 ⇐533

## 203 Homicide

## 203II Murder

203k533 k. Recklessness, Wantonness, or Extreme Indifference. Most Cited Cases  
Depraved heart murder requires an entirely different level of culpability from that required for vehicular homicide. K.S.A. 21-3402(b).

## [7] Automobiles 48A ⇐355(13)

## 48A Automobiles

## 48AVII Offenses

## 48AVII(B) Prosecution

48Ak355 Weight and Sufficiency of Evidence

48Ak355(13) k. Homicide. Most Cited Cases

Evidence was sufficient to support defendant's

conviction for depraved heart murder; defendant admitted that his driving was preceded by drinking, defendant admitted that he struck two parked cars and ignored commands to stop because he was concerned that he had been drinking, defendant then consumed additional alcohol and used crack cocaine, defendant resumed driving and caused a fatal collision due in part to excessive speed, defendant failed to render aid to victims, and defendant fled scene in order to avoid criminal liability. K.S.A. 21-3402(b).

**\*\*117 \*1087 Syllabus by the Court**

1. Depraved heart murder as defined by K.S.A. 21-3402(b) is distinguished from reckless involuntary manslaughter by the additional element that the reckless killing occur under circumstances manifesting extreme indifference to the value of human life.

2. Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second-degree murder, and less extreme recklessness is punished as manslaughter.

3. The 1993 amendment to K.S.A. 21-3402 eliminated malice as an element of second-degree murder in Kansas.

4. The required state of mind for depraved heart murder can be attributed to the driver of an automobile in a fatal collision; relevant factors to show such state of mind include intoxication, speeding, near or nonfatal collisions shortly before the fatal accident, driving on the wrong side of the road, failure to aid the victim, failure to heed traffic signs, failure to heed warnings about reckless driving, and a prior record of driving offenses.

5. Under the facts of this case, evidence is sufficient to support a conviction of depraved heart murder by the driver of an automobile where: (a) defendant admits that his driving was preceded by drinking; (b) defendant admits that he struck two parked cars and ignored commands to stop because he was concerned that he had been drinking; (c) defendant then consumed additional alcohol and used crack cocaine; (d) defendant then resumed driving and caused a fatal collision, due in part to excessive speed; (e) defendant failed to render aid to the



95 P.3d 116

Page 3

32 Kan.App.2d 1087, 95 P.3d 116  
(Cite as: 32 Kan.App.2d 1087, 95 P.3d 116)

victims; and (f) defendant fled the scene in order to avoid criminal liability. We conclude that these facts clearly demonstrate an extreme indifference to human life.

Korey A. Kaul, assistant appellate defender, for appellant.

\*1088 Kristi L. Barton, assistant district attorney, Nola Foulston, district attorney, and Phill Kline, attorney general, for appellee.

Before GREENE, P.J., McANANY, J., and BRAZIL, S.J.  
GREENE, J.

John P. Doub, III, appeals his conviction of second-degree murder pursuant to K.S.A. 21-3402(b), claiming insufficiency of evidence. We affirm.

#### *Factual and Procedural Overview*

Following a party for his softball team at a club where he admitted drinking six beers, Doub admitted that his pickup struck two parked vehicles and that he left the scene because he was concerned that he had been drinking. Doub ultimately admitted that, approximately 2 hours after striking the parked cars, he drove his pickup into the rear of a Cadillac in which 9-year-old Jamika Smith was a passenger. According to the State's accident investigator, the collision occurred as Doub's pickup, "going tremendously faster," drove "up on top of [the Cadillac]," initially driving it down into the pavement, and ultimately propelling it off the street and into a tree. Doub offered no aid to the victims, left the scene of the accident, and initially denied any involvement in the collision, suggesting that his pickup had been stolen. Some 15 hours after the collision, Smith died as a result of blunt traumatic injuries caused by the collision.

Approximately 6 months after these events, Doub admitted to a former girlfriend that he had a confrontation with his second ex-wife the evening of the collision, had been drinking alcohol and smoking crack, and had subsequently caused the collision. The girlfriend approached the authorities

with Doub's statements, which suggested that Doub left the softball party, caused the collisions with the parked vehicles, left that scene, subsequently consumed the additional alcohol and crack cocaine, and then caused the collision resulting in Smith's death, all within a 2- to 3-hour period.

Doub was charged with: (1) second-degree depraved heart murder, with lesser included \*\*118 offenses of involuntary manslaughter and vehicular homicide; (2) involuntary manslaughter while driving under the influence of alcohol and/or drugs, with the lesser included \*1089 offense of driving under the influence of alcohol and/or drugs; and (3) leaving the scene of an injury accident. The jury found Doub guilty of all three primary offenses, but the court later dismissed the second offense of involuntary manslaughter. Doub appeals, challenging the sufficiency of evidence to support his conviction of second-degree depraved heart murder.

#### *Standard of Review*

[1] When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Jamison*, 269 Kan. 564, 571, 7 P.3d 1204 (2000).

#### *Elements of Second-degree "Depraved Heart" Murder*

K.S.A.2003 Supp. 21-3402 defines second-degree murder as follows:

"Murder in the second-degree is the killing of a human being committed:

- (a) Intentionally; or
- (b) unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."

When the offense is committed pursuant to subsection (b), our courts have employed the

32 Kan.App.2d 1087, 95 P.3d 116  
(Cite as: 32 Kan.App.2d 1087, 95 P.3d 116)

common-law nomenclature of "depraved heart" second-degree murder. See, e.g., *State v. Hebert*, 277 Kan. 61, 104, 82 P.3d 470 (2004).

[2][3] In *State v. Robinson*, 261 Kan. 865, 876-78, 934 P.2d 38 (1997), our Supreme Court discussed the requirements for depraved heart murder:

"Both depraved heart murder and reckless involuntary manslaughter require recklessness—that the killing be done under circumstances showing a realization of the imminence of danger and a conscious disregard of that danger. *Depraved heart murder requires the additional element that the reckless killing occur under circumstances manifesting extreme indifference to the value of human life.*

....  
"We hold that depraved heart second-degree murder requires a conscious disregard of the risk, sufficient under the circumstances, to manifest extreme indifference to the value of human life. *Recklessness that can be assimilated to purpose \*1090 or knowledge is treated as depraved heart second-degree murder*, and less extreme recklessness is punished as manslaughter. Conviction of depraved heart second-degree murder requires proof that the defendant acted recklessly under circumstances manifesting extreme indifference to the value of human life. This language describes a kind of culpability that differs in degree but not in kind from the ordinary recklessness required for manslaughter." (Emphasis added.) 261 Kan. at 876-78, 934 P.2d 38.

In *Robinson*, the court specifically rejected the argument that the offense required general indifference to the value of all human life and concluded that the elements could be met if the defendant manifested an extreme indifference to the value of one specific human life. 261 Kan. at 880, 934 P.2d 38. In *State v. Davidson*, 267 Kan. 667, 684, 987 P.2d 335 (1999), the court reiterated the *Robinson* criteria and held that the offense was committed by a defendant who created an unreasonable risk and then consciously disregarded it in a manner and to the extent that it reasonably could be inferred that she was extremely indifferent to the value of human life.

We find no reported decision in Kansas construing and applying K.S.A. 21-3402(b) in the context of a vehicular collision and therefore approach this appeal as a case of first impression.

#### *Overview of Depraved Heart Murder by Vehicle in Other Jurisdictions*

[4] The state of mind or *mens rea* required for second-degree murder has been somewhat problematic throughout the history\*\*119 of Anglo-American jurisprudence. As early as 1762, Sir Michael Foster termed the requisite mental state for the common-law offense as a "heart regardless of social duty and fatally bent upon mischief." Foster, Crown Law 257 (1762). Since the advent of the automobile in the nineteenth century, many jurisdictions have struggled with the application of second-degree murder statutes in this context, and the debate seems to have been focused largely on whether malice, whether express or implied, should be required. See, e.g., *State v. Chalmers*, 100 Ariz. 70, 411 P.2d 448 (1966). We need not enter this debate, however, since our Supreme Court has determined that the 1993 amendment to the second-degree murder statute eliminated malice as an element of second-degree murder in Kansas. \*1091 *State v. McCown*, 264 Kan. 655, Syl. ¶ 1, 957 P.2d 401 (1998). Instead, our focus is the statutory language adopted in Kansas that apparently had its genesis in the Model Penal Code first proposed in 1962, which required killing "recklessly under circumstances manifesting extreme indifference to the value of human life." A.L.I., Model Penal Code § 210.2 (Proposed Official Draft 1962).

Since 1975 the appellate courts of many states have acknowledged that the required state of mind for depraved heart murder can be attributed to the driver of an automobile. See, e.g., *Davis v. State*, 593 So.2d 145, 148 (Ala.Crim.App.1991) (holding that under Alabama depraved heart statute, driver could be convicted if the driver was "conscious of his acts, the impending dangers surrounding him, and the probable results of the acts, and, with reckless indifference to the probable consequences of his acts, brought about the collision and the death

95 P.3d 116

Page 5

32 Kan.App.2d 1087, 95 P.3d 116  
(Cite as: 32 Kan.App.2d 1087, 95 P.3d 116)

of the deceased"). Our review of such cases reveals that most jurisdictions with statutory provisions patterned after the Model Penal Code have acknowledged that the offense may be committed by automobile. Cases to the contrary generally construe and apply statutes that retain some requirement of malice. See, e.g. *State v. Ellison*, 561 So.2d 576 (Fla.1990) (holding that under Florida law, defendant's conviction of second-degree murder for speeding and eluding officers during a high speed pursuit could not stand without evidence of "ill-will, hatred, spite or an evil intent"); see Annot., *Homicide By Automobile As Murder*, 21 A.L.R.3d 116.

[5] One commentator surveyed 20 cases between 1975 and 1986 and found the following factors as persuasive of the requisite state of mind:

"1. Intoxication. The driver was using alcohol, illegal drugs, or both.

"2. Speeding. Usually excessive rates are recorded.

"3. Near or nonfatal collisions shortly before the fatal accident. Courts believe that collisions should serve as a warning to defendants that their conduct is highly likely to cause an accident. Failure to modify their driving is viewed as a conscious indifference to human life.

"4. Driving on the wrong side of the road. Many cases involve head-on collisions. Included here is illegally passing or veering into oncoming traffic.

"5. Failure to aid the victim. The driver left the scene of the accident and/or never attempted to seek aid for the victim.

\*1092 "6. Failure to heed traffic signs. Usually more than once prior to the fatal accident, the driver ran a red light and/or stop sign.

"7. Failure to heed warnings about reckless driving.

In *Pears v. State*, for example, the court cited as proof of Pears' extreme indifference to life the fact that he continued driving after he had been warned by police officers not to drive because he was intoxicated. In other cases a police pursuit of the driver for earlier traffic violations was an implicit warning that the defendant's driving was dangerous.

"8. Prior record of driving offenses (drunk or reckless driving or both). The relevance of a defendant's prior record for reckless or intoxicated driving is, as *United States v. Fleming* pointed out, not to show a propensity to drive while drunk but

to establish that defendant had grounds to be aware of the risk his drinking and driving while intoxicated presented to others.' " Luria, *Death on the Highway: Reckless Driving as Murder*, 67 Or. L.Rev. 799, 823 (1988).

\*\*120 Application of these factors seems appropriate to determine whether evidence in a particular case meets the requisite state of mind, but we are mindful that no precise universal definition or exclusive criteria is appropriate. The comments to the Model Penal Code declare that "recklessness" must be of such an extreme nature that it demonstrates an indifference to human life similar to that held by one who commits murder purposely or knowingly, but precise definition is impossible. "The significance of purpose of knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life. Whether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter." A.L.I., Model Penal Code & Commentaries Part II § 210.2, Comment. 4, pp. 21-22 (1980).

*Did the Evidence Against Doub Establish the Requisite State of Mind for Second-degree Murder?*

Many of the factors cited as relevant to the requisite state of mind in similar prosecutions beyond Kansas are present here. Viewing the evidence in the light most favorable to the prosecution, our examination of the record shows:

\*1093 (i) The State presented evidence of intoxication, both the consumption of beer at the club, but the later consumption of alcohol and use of crack cocaine;

(ii) The State presented evidence of nonfatal collisions shortly before the fatal collision,

95 P.3d 116

Page 6

32 Kan.App.2d 1087, 95 P.3d 116  
(Cite as: 32 Kan.App.2d 1087, 95 P.3d 116)

specifically the collision with two parked vehicles;  
(iii) The State presented evidence of speeding at the time of the fatal collision, specifically that Doub's vehicle was moving "tremendously faster" than the vehicle struck;  
(iv) The State presented evidence of driving on the wrong side of the road when one of the parked vehicles was hit;  
(v) The State presented evidence of leaving the scene of all incidents, both with parked vehicles and the vehicle containing Smith; moreover, Doub did not attempt to render aid to Smith but rather chose to flee to avoid criminal liability;  
(vi) The State presented evidence of residents near the parked vehicles shouting at Doub to stop, but Doub failed to heed these warnings.

Doub argues that his conduct was not even sufficiently egregious to constitute vehicular homicide, citing *State v. Krovvidi*, 274 Kan. 1059, 58 P.3d 687 (2002), which reversed a conviction for vehicular homicide. The following language defines the crime of vehicular homicide, which is quite different from the language defining depraved heart murder:

"Vehicular homicide is the unintentional killing of a human being committed by the operation of an automobile, airplane, motor boat or other motor vehicle in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances." K.S.A. 21-3405.

[6] The facts in *Krovvidi*, however, differed greatly from those before us. In *Krovvidi*, the State pointed exclusively to inattentive driving and the fact that the driver drove through a red light as factors showing conduct that rose to the level of culpability required under the vehicular homicide statute. 274 Kan. at 1070-71, 58 P.3d 687. \*1094 Here, the facts are far more egregious. Moreover, depraved heart murder requires an entirely different level of culpability from that required for vehicular homicide. The following language from *Krovvidi* is instructive:

"In this case, there are no aggravating factors present. Krovvidi had not been drinking and was not under the influence of any drug, both factors which may provide\*\*121 the additional evidence to establish a material deviation. None of the passengers in his vehicle warned him as he was about to enter the intersection; none were concerned that his driving appeared reckless or that he was accelerating or speeding as he approached the intersection. Krovvidi was not speeding and proceeded through the intersection thinking his light was green. Absent additional aggravating factors, we conclude that his conduct does not amount to the material deviation required under the provisions [of] K.S.A. 21-3405." 274 Kan. at 1075, 58 P.3d 687.

In contrast to *Krovvidi*, Doub had been drinking, was undoubtedly under the influence of crack cocaine, ignored commands to stop, was speeding at least by comparison if not illegally, and otherwise exhibited additional factors of recklessness. Doub's reliance on *Krovvidi* is simply misplaced.

[7] Considering the presence of many of those factors significant to other courts, we are convinced that a rational factfinder could have found Doub guilty of depraved heart second-degree murder beyond a reasonable doubt. The evidence against Doub is particularly damning considering that (a) he admits that his driving was preceded by drinking; (b) he admits that he struck two parked cars and ignored commands to stop because he was concerned that he had been drinking; (c) he then consumed additional alcohol and used crack cocaine; (d) he then resumed driving and caused a fatal collision, due in part to excessive speed; (e) he failed to render aid to the victims; and (f) he fled the scene in order to avoid criminal liability. We conclude that these facts clearly demonstrate an extreme indifference to human life.

Affirmed.

Kan.App.,2004.  
State v. Doub  
32 Kan.App.2d 1087, 95 P.3d 116

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